

Case No.: 2008-35
Decision No.: OHSTC-09-026

**CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY**

T. Bucknor
appellant

and

Tokmakjian Inc.
respondent

June 26, 2009

This case was decided by Appeals Officer Douglas Malanka.

Appearance for the appellant

T. Bucknor, Bus Transit Operator, Tokmakjian Inc.

Appearance for the respondent

B. Pistillo, Manager, Transit Manager, Tokmakjian Inc.

Introduction:

- [1] The appeal in this case was made pursuant to subsection 129(7) of the *Canada Labour Code Part II* (the *Code*) which pertains to an appeal of health and safety officer decision of absence of danger. An oral hearing was held on February 25, 2009 after which parties submitted additional documents and written argument.

Background

- [2] Health and safety officer (HSO) Karen Malcolm did not appear at the hearing but the following facts are taken from her *Refusal to Work Case of Danger – Investigation Report and Decision*, dated November 10, 2008 and her *Assignment Narrative Report*, dated November 17, 2008 provided to parties prior to the hearing.
- [3] On November 6, 2008, the Appellant, T. Bucknor, a bus transit operator with Tokmakjian Inc., met with HSO Karen Malcolm at the Thornhill Community Centre parking lot located at the corner of Bayview Avenue and John Street in Toronto, Ontario. Also present were B. Pistillo, Transit Manager, N. Chung, Assistant Manager of Operations and S. Smart, workplace health and safety representative, also from Tokmakjian Inc.. HSO Malcolm understood she was there to investigate T. Bucknor's complaint to her on November 4, 2008 regarding safety concerns he had relative to driving his bus through the Thornhill Community Centre parking lot. She thought her investigation could avoid a refusal to work by T. Bucknor.
- [4] HSO Malcolm stated in her *Assignment Narrative Report* that T. Bucknor arrived driving a transit bus and was relieved by another driver so that he could participate in her investigation. T. Bucknor informed HSO Malcolm that he was, in fact, refusing to work. T. Bucknor further informed her that his refusal to work included the danger of entering and exiting Thornhill Community Centre.
- [5] HSO Malcolm's Report states that B. Pistillo disagreed that a danger existed for T. Bucknor and she then investigated T. Bucknor's health and safety complaint as a refusal to work.
- [6] According to HSO Malcolm's *Refusal to Work Case of Danger – Investigation Report and Decision*, she decided that a danger did not exist for T. Bucknor relative to driving through the Thornhill Community Centre parking lot and verbally informed parties of her decision. Among others things, HSO Malcolm cited the following observations in her report relative to her decision of absence of danger:

- the route had existed for a number of years;
- the bus does not stop to pick-up or discharge passengers in the Centre;
- pedestrians and cars moved about in the parking lot area during the approximate hour that she observed the parking lot from approximately 2:00 p.m. to 3:00 p.m.;
- during this time 3 Tokmakjian Inc. buses entered the Thornhill Community Centre;
- B. Pistillo stopped the three buses and HSO Malcolm asked the drivers if they had any health and safety concerns related to driving through the parking lot;
- they stated to her that they did not have any problems but agreed that they take extra care and caution when driving through the Thornhill Community Centre parking lot.

[7] HSO Malcolm stated in her *Assignment Narrative Report*, that she had not required T. Bucknor to complete and sign a Human Resources and Development Canada (HRDC) Refusal to Work Registration form on November 6, 2008, when she investigated his refusal to work. She, therefore, forwarded a Refusal to Work Registration form to him by e-mail on November 7, 2008 and requested that he complete the form and return it to her. Instead, T. Bucknor went to the HRDC office on November 10, 2008, and completed the form there.

[8] HSO Malcolm also confirmed in her *Assignment Narrative Report* that on November 12, 2008, she went to a meeting at Tokmakjian Inc. to provide parties with a written confirmation of her oral decision of absence of danger made on November 6, 2008 in respect of T. Bucknor's refusal to work. Her written confirmation of decision was dated November 12, 2008.

[9] According to her *Assignment Narrative Report*, T. Bucknor informed her that she had not investigated his refusal to work properly because his refusal to work included the danger of entering and exiting the parking lot. T. Bucknor wrote the following in his Refusal to Work Registration form completed and submitted to HRDC on November 10, 2008:

Dangerous and Hazardous working conditions of entering and exiting Thornhill Community Centre located at the North East corner of John Street and Bayview Avenue.

[10] HSO Malcolm advised B. Pistillo by e-mail on November 17, 2008 that she had not investigated the health and safety concerns that T. Bucknor referred to in his Refusal to Work Registration dated November 10, 2008 because she believed that health and safety issue for T. Bucknor on November 6, 2008 was driving inside the parking lot area. She advised him to conduct the employer investigation as required by the *Code* and

decide if he agreed with T. Bucknor that a danger existed related to entering and exiting the Thornhill Community Centre. If he disagreed and a resolution could not be reached, she advised him that he or T. Bucknor should inform a health and safety officer of the continued refusal to work and an officer would investigate.

- [11] On November 20, 2008, T. Bucknor appealed HSO Malcolm's November 12, 2008, decision of absence of danger to an Appeals Officer pursuant to subsection 129(7) of the *Code* and I became seized of the matter. The review by an Appeals Officer pursuant to subsection 146.1 of the *Code* is *de novo* in nature and all aspects of danger raised by T. Bucknor relative to entering, driving through and exiting Thornhill Community Centre were considered in my review.

Issue

- [12] The issue in this case is whether or not a danger exists for T. Bucknor while entering, driving through and exiting Thornhill Community Centre in his bus.

Submissions of the Parties:

Appellant's Submissions

- [13] T. Bucknor testified that he must make a left turn across 2 north bound lanes of traffic on Bayview Avenue to enter Thornhill Community Centre. He maintained that this constitutes a danger because the intersection is not controlled by traffic lights. He must, therefore, wait until traffic on the north bound lanes on Bayview Avenue clears, or yields the right of way to him.
- [14] T. Bucknor held that this is dangerous because he cannot always count on all vehicles in the northbound lane slowing or stopping to let him make his turn safely. He added that vehicles turning left out of the Thornhill Community Centre will dart in front of the bus to take advantage of the slowed traffic in the northbound lanes making the turn more dangerous for him.
- [15] T. Bucknor stated that the Thornhill Community Centre is a very busy community centre and there could be up to 300 people there at any given time. He testified that, once in the Thornhill Community Centre, the bus must proceed about 15 meters to a stop sign where it then must make a right hand turn. Because the roadway is narrow, he stated that the bus must make a wide turn which causes it to encroach onto the oncoming lane and to come in close proximity to the entrance walkway of the

community centre. T. Bucknor held that this poses a danger to the many pedestrians who use the facilities at the Thornhill Community Centre which includes children and the elderly. He added that the danger is increased because bicyclists and cars can move into the right hand lane, unknown to the driver, while the bus transit driver is making the wide right turn.

- [16] T. Bucknor pointed out that while HSO Malcolm was at the Thornhill Community Centre conducting her investigation a car headed towards a bus making a right hand turn at this location and the bus had to drive onto the curb to avoid collision with the car.
- [17] T. Bucknor maintained that the danger of travelling through Thornhill Community Centre is worsened by the fact that there can be up to thirty cars parked along the narrow roadway and this has resulted in situations where cars have backed out of a parking spot and struck a bus. T. Bucknor added that he has experienced numerous incidents in the Centre where a child ran out from a parked car to go into the Thornhill Community Centre and he had to brake immediately to avoid hitting the child. T. Bucknor testified that he had reported 120 incidents at the Thornhill Community Centre to B. Pistillo, S. Smart, health and safety representative and K. Skrepnek, Fleet Safety and Compliance officer at Tokmakjian Inc. He then complained to HSO Malcolm.
- [18] T. Bucknor maintained that the situation constitutes a danger because the near miss collisions with children have left him emotionally shaken for the remaining of his shift and he fears the impact on his mental well being if a collision resulted in an injury or fatality. T. Bucknor referred specifically to the definition of danger in the *Code* and maintained that the *Code* places also an obligation on him if his activities endanger the health and safety of any person.
- [19] T. Bucknor's also held that a danger exists when he exits the Thornhill Community Centre and turns right to proceed west on John Street. He testified that the intersection is narrow and the bus transit driver must make a wide turn causing the driver to encroach on the second lane of westbound traffic. This constitutes a danger of colliding with a vehicle travelling in the second lane on John Street, or another vehicle turning left onto John Street. T. Bucknor additionally held that, while the bus is engaged in making the wide right hand turn, a bicycle or other vehicle can, unbeknownst to the transit driver, come up beside the bus and occupy the lane. Since the bus must immediately turn right at the next corner to proceed north on Bayview Avenue this not only can, but has, resulted in a car colliding with the rear end of a bus.

Respondent's Submissions

- [20] B. Pistillo testified that the Thornhill Community Centre is a turn around point and there are no service stops for discharging or picking up passengers.
- [21] He stated that York Regional Transit (YRT) establishes the routes followed by Tokmakjian Inc. drivers and, while YRT asks Tokmakjian Inc. for their input, Tokmakjian Inc. has no control over setting the route.
- [22] N. Chung added that YRT currently has a risk assessment team when establishing routes and Tokmakjian Inc. can submit any concerns it has to this risk assessment team. However, Tokmakjian Inc. does not participate in YRT's risk assessments.
- [23] B. Pistillo stated that Tokmakjian Inc. made YRT aware of T. Bucknor's safety concerns regarding the Thornhill Community Centre turn around point and YRT is looking into the matter. B. Pistillo clarified that, notwithstanding this submission to YRT, he does not agree with T. Bucknor that the turn around at Thornhill Community Centre constitutes a danger.
- [24] B. Pistillo testified that all drivers are trained to drive defensively and receive refresher courses on a regular basis. He stated that extra care and caution is required when driving through the area and drivers must look for hazards and stop and wait if necessary. He added that cars do not pose a danger to a bus driver if there should be a collision.
- [25] B. Pistillo testified that he was not aware if Tokmakjian Inc. had conducted a job hazard analysis for Route 3 or the Thornhill Community Centre turn around. He later confirmed this in writing that he had not been able to locate any job hazard identification and assessment at Tokmakjian Inc. He also confirmed that YRT was unable to provide him any record of any risk identification and assessment conducted by them for the Thornhill Community Centre turn around.
- [26] B. Pistillo denied T. Bucknor's allegation that he had informed him of near-miss incidents at Thornhill Community Centre involving pedestrians. He stated that he could only recall three minor accidents that occurred in the Thornhill Community Centre and all were minor.

Analysis

[27] The issue in this case is whether a danger exists for T. Bucknor when entering, driving through or exiting the Thornhill Community Centre, a turn around location on Route 3. For this it is necessary to consider Part II of the Canada Labour Code and the evidence and argument presented in the case.

[28] Danger is defined in section 122(1) of the Code as follows:

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

[29] Justice Gauthier wrote in her paragraph 36 of her decision in the case of Juan Verville and Correctional Services Canada, 2004 FC 767 that for a finding of danger it is necessary to determine the circumstances where a potential hazard or condition or future activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard condition or activity can be corrected or activity altered. It is then necessary to establish that the circumstances will occur in the future as a reasonable possibility. That is the criteria that will be applied in this appeal. Paragraph 36 of that decision reads:

[36] In that respect, I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in Martin above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one. [My underline]

[30] For deciding the matter, I will consider the three separate situations that T. Bucknor raised in his refusal to work complaint which are as follows:

- entering Thornhill Community Centre;
- travelling through the Thornhill Community Centre; and
- exiting the Thornhill Community Centre.

Entering Thornhill Community Centre

- [31] T. Bucknor's allegation was that there is a danger of his bus being in collision with another vehicle when entering the Thornhill Community Centre because there is no traffic control device at the intersection and he must cross two lanes of traffic on Bayview Avenue and contend with traffic exiting the Centre. He did not provide evidence of any other circumstances peculiar to this intersection.
- [32] In my opinion, none of these circumstances, taken alone or together, could be reasonably expected to cause injury to any person exposed thereto.
- [33] In such circumstances, drivers must exercise care and caution and take whatever measures are necessary to avoid an accident. In this regard, Tokmakjian Inc. provides its drivers with ongoing defensive driving training. There was no evidence presented in this case that it was impossible for T. Bucknor to avoid an accident by stopping and waiting until he is able to make the left turn safely into the Thornhill Community Centre.
- [34] Having considered the evidence in the case, it is not, in my view, reasonable in the circumstances to expect beyond mere speculation that the hazard could cause injury to T. Bucknor before the hazard could be corrected.

Travelling through Thornhill Community Centre

- [35] T. Bucknor alleged that a danger exists for him relative to driving through the Thornhill Community Centre because he would be traumatized if he were to accidentally injure someone with his bus. He testified that he had experienced several near miss accidents involving children running in front of his bus and that these had left him shaken for the rest of the day.
- [36] He held that the hazard of striking someone in the Community Centre with his bus is elevated to a danger under the Code in the following circumstances:
- there could be as many as 300 people at the Centre at any given moment;
 - due to the narrowness of the roadway, a right hand turn in the Thornhill Community Centre causes buses to encroach on the on-coming lane and to come close to pedestrians standing on the walkway in front of the entrance to the Centre;

- the narrow roadway in Thornhill Community Centre is bordered with parked cars; and
- school buses park in the oncoming lane to discharge or pickup passengers.

- [37] Based on this, there is no doubt in my mind that buses in the Thornhill Community Centre operate in close proximity to pedestrians requiring bus drivers to exercise extra care and caution. This is, however, insufficient on its own to establish that a danger existed for T. Bucknor.
- [38] T. Bucknor alleged having experienced approximately 120 near miss incidents at the Thornhill Community Centre and further alleged having reported them to B. Pistillo, S. Smart, health and safety representative and K. Skrepnek, Fleet Safety and Compliance officer at Tokmakjian Inc.. However, he did not produce evidence at the hearing to corroborate these near-miss occurrences or his allegation that he reported them to B. Pistillo. I found this significant given T. Bucknor's otherwise conscientious nature demonstrated at the hearing.
- [39] Based on this and the testimony of B. Pistillo that he had not received any near miss reports from T. Bucknor, I am inclined to interpret the near miss occurrences alleged by T. Bucknor as being more hypothetical in nature than actual.
- [40] The opinion of other Tokmakjian Inc. bus drivers surveyed by HSO Malcolm during her investigation of T. Bucknor's refusal to work was that they did not see any problem or issues with driving through Thornhill Community Centre but that extra care and caution was needed. In this regard, I note that Tokmakjian Inc. bus drivers, including T. Bucknor, are trained in defensive driving and provided with refresher courses.
- [41] Having considered the evidence in the case, it is not, in my view, reasonable in the circumstances to expect beyond mere speculation that the hazard could cause injury to T. Bucknor before the hazard could be corrected.

Exiting from Thornhill Community Centre

- [42] T. Bucknor's held that a danger exists when he exits the Thornhill Community Centre and turns right to proceed west on John Street.
- [43] Other than a general reference to a car once colliding with a bus that was in the process of making a right turn from John Street to Bayview Avenue, T. Bucknor provided no other evidence to corroborate the

existence of circumstances that would raise the risk connected with exiting the Thornhill Community Centre to a level of danger under the Code.

- [44] It is not, in my view, reasonable in the circumstances presented to expect beyond mere speculation that the hazard could cause injury to T. Bucknor before the hazard corrected.

Decision

- [45] I, therefore, find that a danger does not exist for T. Bucknor in connection with travelling through the Thornhill Community Centre and confirm the decision of HSO Malcolm. I further find that a danger does not exist for T. Bucknor related to entering or exiting the Thornhill Community Centre with his bus.

Douglas Malanka
Appeals Officer

SUMMARY OF APPEALS OFFICER DECISION

<u>Decision</u>	OHSTC-09-026
<u>Appellant</u>	T. Bucknor
<u>Respondent</u>	Tokmakjian Inc.
<u>Provisions</u>	
<i>Canada Labour Code</i>	122.1, 125.(1)(z.03), 124, 128, 129(7), 145(2), 146.1
<u>Keywords</u>	danger, bus transit operator, bus transit operations, community centre, unguarded intersections, entry into community centre, narrow roadway through community centre, numerous pedestrians, large parking lot, near-miss collisions, exit turn from community centre.

SUMMARY

A bus transit operator, refused to work and enter a busy community centre used by the transit company as a bus turn-around point. T. Bucknor complained that the intersection entering into the community centre constituted a danger as there were no traffic control devices at the intersection to control traffic. He also maintained that driving through the community centre constituted a danger for him and others because the roads were narrow, pedestrian and vehicular traffic was significant and because of near-miss collisions he had experienced involving child pedestrian and vehicular traffic. The driver finally held that exiting the community centre constituted a danger because the narrowness of the roadway in the community centre caused the bus to encroach on the next lane when it turned out of the centre. He maintained that this could result in a collision with the front or rear of the bus.

The health and safety officer who investigated the refusal to work decided that a danger did not exist in connection with driving through the community centre.

The Appeals Officer confirmed the health and safety officer's decision that a danger did not exist for the driver in connection with driving through the community centre. The Appeals Officer also found that a danger did not exist for the driver relative to entering and exiting the community centre with his bus.